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MEMORANDUM

To: House Committee on Judiciary
From: Office of Revisor of Statutes
Date: March 12, 2024
Subject: Bill Brief for SB 458

SB 458 specifies that certain drug offenses do not give rise to forfeiture under the Kansas standard asset seizure and forfeiture act, requires courts to make a finding that forfeiture is not excessive, restricts actions prior to commencement of forfeiture proceedings, requires probable cause affidavit filing and review to commence proceedings, increases the burden of proof required to forfeit property to clear and convincing evidence, provides persons involved in forfeiture proceedings the ability to request a jury trial, authorizes courts to order payment of attorney fees and costs for certain claimants, and requires the Kansas bureau of investigation to submit forfeiture fund financial reports to the legislature.

The 2023 Special Committee on Civil Asset Forfeiture recommended the following reform measures be considered by the 2024 Legislature, and each of these measures is contained in the bill: (1) Deleting offenses involving controlled substances that apply primarily to a “user” from the list of offenses giving rise to forfeiture; (2) Requiring seizing agencies to return property if certain timelines are not met to engage an attorney or otherwise move the case forward; (3) Prohibiting pre-forfeiture waivers of rights in property; (4) Allowing a proportionality hearing to be requested at any time; (5) Requiring a judge to determine whether there is probable cause supporting forfeiture as a preliminary matter; (6) Requiring an automatic stay of discovery in the forfeiture proceeding during a criminal proceeding alleging the same conduct; (7) Establishing that a seizing agency can be ordered to pay a prevailing claimant’s attorneys’ fees; and (8) Requiring the State to prove property is subject to forfeiture by a “clear and convincing” standard. In addition, the Committee recommended the following items be further studied by a standing committee of the 2024 Legislature: (1) Transfers and federal adoptions; (2) The right to a jury trial in forfeiture proceedings; (3) The right to counsel in forfeiture proceedings; and (4) Where forfeiture proceeds should be directed. The bill contains provisions related to federal adoptions and jury trials.

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Section 1 amends K.S.A. 60-4104 related to conduct and offenses giving rise to forfeiture under the Kansas standard asset seizure and forfeiture act. Under current law in subsection (b), violations involving controlled substances as described in K.S.A. 21-5701 through 21-5717 are subject to forfeiture. Under the bill, subsection (b) only includes violations involving controlled substances as described in K.S.A. 21-5703, 21-5705, 21-5707, 21-5708(b), 21-5709(a), (b)(1), (c) and (d), 21-5710, 21-5713(a), 21-5714 and 21-5716, which excludes simple possession and other crimes that are associated only with personal use of controlled substances.

Section 2 amends K.S.A. 60-4106 related to property exempt from forfeiture. Current law in subsection (c) provides that prior to final judgment in a forfeiture proceeding, a court shall limit the scope of a proposed forfeiture to the extent the court finds the effect of the forfeiture is grossly disproportionate to the nature and severity of the owner's conduct. This provision is amended to require the court to determine whether the proposed forfeiture is unconstitutionally excessive pursuant to K.S.A. 60-4112(g), Section 6 of the bill, if the court has not made such determination earlier in the proceeding as a result of a petition filed pursuant to K.S.A. 60-4112(g).

Section 3 amends K.S.A. 60-4107 related to seizure of property for forfeiture. Current law in subsection (g) gives the agency 45 days after a seizure to forward a written request for forfeiture to the county or district attorney in whose jurisdiction the seizure occurred. The bill reduces this time to 14 days. The bill retains current law in subsections (h) and (i) that requires the county or district attorney to accept or decline the request within 14 days and specifies additional timelines for action after this step in the process, ultimately ending with engaging an attorney to represent the seizing agency or returning the property that was seized.

Also in Section 3, the bill amends the current subsection that allows a seizing agency to request federal adoption of a seizure to provide that no law enforcement agency shall request federal adoption of a seizure pursuant to this act. Finally, the bill adds a new subsection (p) to provide that the seizing agency shall not request, induce, or otherwise coerce a person who has at any time asserted rights as an owner or interest holder of such property to waive in writing such rights in the property until forfeiture proceedings are commenced.

Section 4 amends K.S.A. 60-4109 related to commencement of forfeiture proceedings. Current law in subsection (a) provides that forfeiture proceedings shall be commenced by filing a notice of pending forfeiture or a judicial forfeiture action. The bill amends subsection (a) to require

filing of an affidavit describing the probable cause supporting forfeiture. After an affidavit is filed under this section, further proceedings shall occur only after a judge of the district court has determined from the affidavit that there is probable cause to believe that the property is subject to forfeiture pursuant to K.S.A. 60-4105. The bill also amends subsection (b) to allow the plaintiff's attorney to file a lien for the forfeiture of property only after commencement of a forfeiture proceeding as provided in subsection (a).

Section 5 amends K.S.A. 60-4111 related to claims under the forfeiture act. Current law in subsection (a) provides that only an owner of or interest holder in property seized for forfeiture may file a claim, and that the claim shall be mailed to the seizing agency and to the plaintiff's attorney within 60 days after the effective date of notice of pending forfeiture. The bill adds a new subsection (a)(2) that requires the plaintiff's attorney to file a notice of receipt with the court when a claim is received unless the claim was already filed with the court. Such filing shall include a copy of the claim and documents showing the date that the claim was mailed and received.

Section 6 amends K.S.A. 60-4112 related to judicial proceedings under the forfeiture act. The bill amends subsection (c) to provide that at any time prior to final judgment, an owner or interest holder may petition the court for determination or reconsideration of its prior determination that there is probable cause to believe that the property is subject to forfeiture. The bill amends subsection (e) to provide that if the court finds that there is no probable cause for forfeiture of the property, the court shall order the property released to the custody of the applicant, as custodian for the court, or from a forfeiture lien pending the outcome of a judicial proceeding pursuant to this act.

Also in Section 6, as mentioned above, the bill adds a new subsection (g) related to proportionality hearings and a nonexclusive list of factors for the court to consider in determining whether a forfeiture is unconstitutionally excessive. At any time following seizure, the person from whom possession or control of the property was seized may petition the court to determine whether such forfeiture is unconstitutionally excessive. The plaintiff's attorney has the burden of establishing that the forfeiture is proportional to the seriousness of the offense giving rise to the forfeiture by clear and convincing evidence. Finally, the bill amends subsection (o) to require the court to automatically stay discovery against the criminal defendant and against the seizing agency in civil proceedings during a related criminal proceeding alleging the same conduct, rather than requiring a motion.

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Section 7 amends K.S.A. 60-4113 related to judicial in rem forfeiture proceedings. The bill adds a new provision to subsection (c) that allows a claimant to demand a jury trial pursuant to K.S.A. 60-238. In subsection (h), the bill strikes a provision in current law that provides that the issue shall be determined by the court alone. In addition, the bill changes subsection (h) to provide that the plaintiff's attorney has the initial burden of proving the interest in the property is subject to forfeiture by clear and convincing evidence, rather than by a preponderance of the evidence.

Section 8 amends K.S.A. 60-4114 related to judicial in personam forfeiture proceedings. The bill adds a new provision to subsection (f) that allows a claimant to demand a jury trial pursuant to K.S.A. 60-238.

Section 9 amends K.S.A. 60-4116 related to judicial disposition of property. Current law in subsection (f) provides that the court is required to order a claimant who fails to establish that a substantial portion of the claimant's interest is exempt from forfeiture under K.S.A. 60-4105 to pay the reasonable costs and expenses of any claimant who established such claimant's interest is exempt from forfeiture and to pay the reasonable costs and expenses of the seizing agency for the investigation and litigation of the matter, including reasonable attorney fees, in connection with that claimant. The bill makes this order permissive. In addition, the bill adds a new provision requiring the court to order the seizing agency to pay reasonable attorney fees and costs to a claimant in any proceeding in which the court finds that the claimant has prevailed by ordering the return of at least half of the aggregate value of the claimant's interest in the property or currency in which the claimant asserted an interest. New language in subsection (g) provides that if there are multiple claims to the same property, the seizing agency shall not be liable for attorney fees and costs associated with any claim if the seizing agency: (1) Promptly recognizes such claim; (2) promptly returns the interest of the claimant in the property to the claimant, if the property can be divided without difficulty and there are no competing claims to that portion of the property; (3) does not cause the claimant to incur additional costs or fees; and (4) prevails in obtaining forfeiture with respect to one or more of the other claims.

Section 10 amends K.S.A. 60-4117 related to disposition of forfeited property, use of proceeds, and tracking and reporting of deposits and expenditures. Current law in subsections (d) and (e) requires each law enforcement agency to deposit proceeds from forfeiture into specific funds that shall not be considered a source of revenue to meet normal operating expenses, shall be expended by the agencies or departments through the normal city, county or state appropriation

system, and shall be used for special, additional law enforcement purposes specified in subsection (e)(2) as the law enforcement agency head deems appropriate. The bill adds that moneys in these funds may be used for payment of attorney fees, litigation costs and interest ordered by a court pursuant to K.S.A. 60-4116.

Section 11 amends K.S.A. 60-4127 related to the Kansas asset seizure and forfeiture repository. Current law in subsection (d) requires each law enforcement agency to compile and submit a forfeiture fund report to the repository annually, on or before February 1, and subsection (e) requires the Kansas bureau of investigation to report to the legislature any law enforcement agencies in the state that have failed to come into compliance with the reporting requirements. The bill adds new language to subsection (e) that requires the KBI to report annually, on or before April 15, to the president of the senate, the speaker of the house of representatives and the standing committees on judiciary in the senate and the house of representatives: (1) Any law enforcement agencies in the state that have failed to come into compliance with the reporting requirements in subsection (d); and (2) each agency's forfeiture fund financial report submitted pursuant to subsection (d).